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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Virtually all of the arguments advanced by Amax Coal Company rest on one or more of the following misconceptions: (1) if a company is obligated to bargain with a union over a contract term proposed

by the union, the company must eventually accept that term; (2) because a person who represents an employer or union for purposes of collective bargaining may also serve as a welfare or pension fund trustee, the trustees of such funds may, when administering the trust, advance the interests of the parties that appoint them; and (3) in practice if not in theory, welfare and pension fund trustees engage in ongoing collective bargaining. We address these misconceptions seriatim.

1. Amax repeatedly asserts that were this Court to reverse the Third Circuit and uphold the Board's order insofar as it relates to bargaining over multiemployer welfare and pension funds, Amax would be "forced" and "compelled" (Br. i, 6, 4 n.2) to contribute to multiemployer funds even though it "had proposed [single employer] retirement and health and welfare programs which offered its employees better benefits than those provided by the Union plans" (Br. 3; see also *id.* at 4 n.2, 5, 6 n.3, 12, 13 and 43). As we observed in our opening brief (at 17 n.9), even if a union bargains to impasse on this issue, an employer can place its own proposal on the table and refuse to accede to the union's demand—a right Amax effectively exercised in this case.[1]

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[1] Although we express no opinion on the relative merits of the Union's and the Company's welfare and pension proposals, we note that the concern expressed by Amax (Br. 4 n.2) that multiemployer funds subject employees in one bargaining unit to "short fall[s] in funding caused by * * * 'wildcat' strikes" in another is at least counterbalanced by the fact that multiemployer funds "have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 25 (1974). Moreover,

The perception that Amax had no choice but to accept the terms dictated by the Union is reinforced by Amax's insistence (Br. 3, 4 n.2, 5, 15, 17-18) that the Union's "multiemployer trust funds [were] developed and controlled by an entirely different collective bargaining agreement" (*id.* at 3) entered into between the Union and the Bituminous Coal Operators Association ("the BCOA"), and that because Amax did not wish to be a signatory to the BCOA agreement in connection with the Belle Ayre mine, it was not in a position to negotiate changes in the pension and welfare plans set out in that agreement. This repeated linkage of the multiemployer trust funds with the BCOA agreement fosters the impression that in pressing Amax to participate in the funds, the Union was trying by indirection to do that which it was prohibited from doing directly—force Amax into the BCOA. That is simply not the case. It is clear from the record that the Union did *not* want the Company to be covered by the BCOA agreement (Pet. App. 3a) and instead negotiated for

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should a union insist on a health or retirement plan that works to the relative disadvantage of its members, the members are not without recourse, including decertifying the union or, under this Union's procedures, rejecting the contract. We also note that under Amax's proposed pension plan (which, because it would be established by an employer rather than by a union, would not be governed by Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), the single trustee would be appointed by Amax and would serve at the Company's pleasure. Similarly, the administrator of the plan would be appointed and removable solely by Amax (A. 283-297). Among the Union's stated reasons for rejecting the plan was its desire "to participate in the administration of the retirement program so as to be assured that the pension fund would be administered in the best interests of the employees * * *" (Pet. App. 119a).

a separate contract in which the general terms and conditions of its welfare and pension plans would be set out.[2]

Thus, for example, Article XX of the proposed contract between the Union and the Belle Ayre mine (A. 98e-98x) summarizes the principal health and retirement benefits provided by the Union's multiemployer trusts (A. 98r-98x), sets out a scheme for contributions by Amax into the various trusts (A. 98h-98i), defines certain terms, fixes the responsibilities and duties of trustees (A. 98n-98o), provides for the administration of the trust (A. 98p-98r), and provides for audits, reports and notices (A. 98o-98p). It is apparent that, for the multiemployer funds to be workable, certain of these terms (*e.g.*, the provisions relating to the administration of the trusts, the responsibilities and duties of the trustees and, most pertinent here, the identity of the trust-

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[2] Thus, Amax's assertion (Br. 4) that throughout their negotiations "the Union was bargaining under protest and continued to claim Amax was bound by the [BCOA] Agreement" is incorrect. At the outset of the negotiations the Union proposed that Amax and other western mining companies form a multiemployer bargaining group other than the BCOA and offered to extend for 60 days the contract of each employer that did so. Four employers formed such an association, referred to throughout this proceeding as the Peabody Group. Amax later considered joining the Group but eventually decided no to. On December 20, 1974, the Union began negotiations with the Peabody Group and, on January 7 and 8, 1975, informed Amax that it considered the Company to be part of the Group. On February 3, 1975, after being notified that the General Counsel of the National Labor Relations Board intended to issue a complaint and seek an injunction against it for refusing to bargain with Amax, the Union began independent negotiations with Amax over an independent contract (Pet. App. 3a-4a, 46a-51a, 80a-93a).

ees), like the underlying trust agreements themselves, were not subject to separate negotiation with Amax or with any of the other 2,000 participating employers.[3] It is equally apparent, however, that Amax was free to bargain over the terms of the contract governing the amount of money it would contribute into the trusts.[4]

2. Amax argues at length (Resp. Br. 32-42) that neither the Employee Retirement Income Security Act of 1974 (ERISA), nor the common law precludes trustees from also serving as employees, officers, agents, or collective bargaining representatives of the settlors of the trust. We agree. Indeed, as we acknowledged in our opening brief (at 30 n.29), Section 408(c)(3) of ERISA, 29 U.S.C. 1108(c)(3), expressly permits such dual service. Thus, it is true, to borrow Amax's metaphor (Br. 25, 29, 34), that trustees may wear two hats. It does not follow, however, that they may wear both hats at the same time.

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[3] Contrary to Amax's assertion (Br. 4) that "the Union and BCOA were negotiating *new trustee agreements*" while the contract talks between the Union and Amax were pending, the Union and the BCOA settled their differences in December 1974, two months before the negotiations with Amax commenced (Pet. App. 86a). Thus, "[t]he Funds were already established when the [Union] first proposed that Amax contribute to them * * *" (Pet. App. 137a).

[4] Indeed, in the Union's proposal the rates at which Amax would contribute (expressed in terms of cents per ton of coal mined and cents per hour worked) were not fixed (A. 98h-98i). Moreover, Amax's ability to bargain about the contract provision governing the pension and welfare funds is demonstrated by the fact that the Union agreed to delete the requirement that Amax contribute to the 1950 Trusts (in addition to the 1974 Trusts) upon being informed by the Company that none of its Belle Ayre employees had participated in or were beneficiaries of the earlier funds.

Quite to the contrary, a trustee who also serves as, for example, a union's business agent must doff that hat while making discretionary decisions on behalf of the trust and engaging in its administration. As the Eighth Circuit put it in *NLRB* v. *Construction & General Laborers' Union Local 1140*, 577 F.2d 16, 20 n.6 (1978), cert. denied, 439 U.S. 1070 (1979), Section 408(c)(3) provides that such a trustee may "be the agent of the union *in other contexts*" and may discharge his different roles in separate spheres.[5]

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[5] Throughout its brief, Amax confuses the "dual role" that trustees may play as both trustees and collective bargaining representatives (so long as the functions are not performed simultaneously or in a context or manner that results in divided loyalties) and the dual role they must play as both trustees and "representatives" of the employer or the union as that term is used in Section 302(c)(5)(B). Compare Resp. Br. 21, 29, 38 with *id.* at 27, 42. As we explain in our opening brief (at 23-29), in requiring that there be a balance between trustees appointed by the employer (or employers) and trustees appointed by the union, Section 302(c)(5)(B) was "designed not to alter, but to reinforce 'the most fundamental duty owed by the trustees': the duty of undivided loyalty to the beneficiaries." *Blankenship* v. *Boyle*, 329 F. Supp. 1089, 1095 (D. D.C. 1971), aff'd mem., 511 F.2d 447 (D.C. Cir. 1975). The employer "representatives" were intended to serve as a negative check on the kinds of real and perceived union misuse of pension and welfare funds that led to the enactment of the statute. As Amax correctly observes, employer representatives were meant to serve as "watchdogs." ERISA takes this one step further and places an affirmative duty on *all* trustees to prevent every other trustee of the same fund from breaching his or her fiduciary duties, including the duty to act solely on behalf of trust beneficiaries. 29 U.S.C. 1105(a). Nothing in either statute suggests, however, that while preventing his colleagues from advancing the interests of one party to a collective bargaining agreement a trustee is free to advance the interests of the

3. Amax contends (Br. 12-13, 15-18, 25-26) that the trustees' fiduciary duties apply only to the routine daily administration of the trust, and that the trustees are expected to "bargain" in the interest of their appointing parties in exercising their nonroutine functions under the trust agreement. However, neither ERISA nor the trust instrument at issue in this case permits any such distinction. Section 404 (a) (1) of ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," and provides for no exceptions. Indeed, it is the very discretionary authority that Amax would exempt from fiduciary obligations which makes the trustees fiduciaries under ERISA. See 29 U.S.C. 1002(21) (A). Similarly, Article VI(14) of the trust instrument requires the trustees, without exception, "to exercise any and all powers of the Trustees under this instrument" in the manner they "deem to be for the best interest of the Trust" (A. 277). Accordingly, both the statute and the trust instrument require the trustees to exercise *all* of their discretionary powers solely in the interest of the trust and its participants and beneficiaries, and not, as collective bargaining representatives must, in the interest of the Union or the employers who appointed them. See *Toensing* v. *Brown*, 528 F.2d 69, 71-72 (9th Cir. 1975) (increasing pension benefits constitutes fund administration subject to fiduciary duties).[6]

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other. That result, despite Amax's vigorous advocacy of it, would be self-contradictory and contrary to the manifest intent of Congress.

[6] Contrary to Amax's suggestion (Br. 25-26), the distinction drawn by the courts between "structural" deficiencies in a trust which run afoul of Section 302(c) (5) on the one

Moreover, contrary to Amax's assertion (Br. 12), the fund trustees have no authority to "bind [Amax] to collective bargaining agreement changes." Such changes would not be theirs to make. The contribution rates for coal mined byAmax would be specified in Article XX, Section (c) of the Union's contract proposal (A. 98g-98i), and Article XX, Section (d) would preclude increasing Amax's total contribution during the term of the contract (A. 98k). The trustees would be delegated responsibility for setting contribution rates only for salvaged coal refuse (A. 98k-98*l*). In enforcing an employer's contractual obligation to contribute to the funds, the trustees would have no power to require an employer to make contributions to which he had not agreed in collective bargaining.

> [The trustees'] right to recover contributions from the mine operator is dependent entirely upon the real agreement between the operator and the union. The trustees have no independent right to insist that an operator make any contribution to the fund, or that it do so on the same basis and under the same formula that other operators contribute. The trustees are the third party beneficiaries of the real agreement between the union and operator, which they may enforce in accordance with its terms * * *.

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hand, and the day-to-day administration of a fund on the other, has nothing to do with limiting the reach of the trustees' fiduciary duties. This distinction relates to federal court jurisdiction under Section 302(e), 29 U.S.C. 186(e), which most courts now recognize as limited to correcting violations of the specific requirements set out in Section 302(c)(5) and as not including broad equitable powers to regulate trust administration. See generally *Souza* v. *Trustees of the Western Conference of Teamsters Pension Trust*, 460 F. Supp. 843, 844-846 (N.D. Cal. 1978), and cases there cited.

Lewis v. *Lowry*, 295 F.2d 197, 199 (4th Cir. 1961), cert. denied, 368 U.S. 977 (1962). Similarly, contrary to Amax's assertions (Br. 12-13, 15-16), the trustees could not require Amax to contribute to the funds for coal produced on leased lands or purchased from non-union employers unless Amax had itself agreed to make such contributions in its collective bargaining contract with the Union.[7] Furthermore, as shown in our opening brief (at 37-38), Amax has incorrectly characterized the trustees' authority to determine eligibility for benefits and resolve beneficiaries' claims against the fund as (Resp. Br. 17) "the collective bargaining process of adjusting grievances"; such disputes are between the independent fund and its beneficiaries and are not labor disputes between employees and employers.

The trustees' authority to amend the trust is similarly circumscribed. Thus, Article XX, Section (h)(5) of the Union's contract proposal (A. 98q) permits the trustees "to amend [the trust] unilaterally only to ensure compliance with applicable federal laws." *Robinson* v. *United Mine Workers of America Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981). Other amendments to the trust may be made only by the Union and the employers, or with their approval. As with the resolution of benefit claims, however, such amendments would involve matters between the fund and the beneficiaries and not matters between employees and

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[7] Thus, the reason the trustees would be unable to collect contributions from Amax for the 1950 pension fund (Br. 16) is because the Union eliminated this provision from its contract proposal when it learned that none of the Belle Ayre employees would benefit from that fund (Pet. App. 105a-106a). See also note 4, *supra*.

employers. As noted above, Amax's obligation to contribute to the trust could not be altered by the trustees, and should the Union agree to a change in the types of benefits Amax's employees receive from the fund, it might well thereby violate Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158 (b)(3). *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-188 (1971); *Warehousemen's Union Local 334 (The Crescent)*, 253 N.L.R.B. No. 109 (Jan. 8, 1981) (amendment of trust to provide new benefits which were rejected in collective bargaining with independent employer violated Section 8(b)(3)).[8]

Finally, contrary to Amax's repeated assertion (Br. 5-6, 13, 31-32, 45), the multiemployer fund trustees did not participate in the Union's collective bargaining with Amax. When Amax proposed that the Union's concern about the lack of portability of benefit credits of a single-employer retirement plan could be resolved by means of a reciprocity agreement

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[8] In *The Crescent*, the Board refused to permit the union to avoid responsibility under Section 8(b)(3) for unilateral changes in available benefits merely by delegating to the trustees the authority to amend the trust. Cf. *National Union of Hospital and Health Care Employees (Sinai Hospital)*, 248 N.L.R.B. 631 (1980), application for enforcement pending (4th Cir. No. 80-1499). Neither *The Crescent*, nor any of the other Board cases cited (at 22) on Amax's brief, involved any sort of "bargaining" between union trustees and employer trustees. Rather, as noted in our opening brief (at 42 n.29), the Board in these cases treated the entire board of trustees of a fund as an agent of both collective bargaining parties for certain limited purposes. Amax has pointed to no case in which the Board has ever purported to regulate the relationship between employer-appointed trustees and union-appointed trustees in the internal administration of the trust, which would be the result if, as the court of appeals found, the trustees bargain collectively with each other. *Id.* at 41-42.

between Amax's separate pension plan and the Union's national fund, the Union inquired of the fund trustees whether this would be possible under the terms of the trust. The trustees responded that they had no authority to alter the fund to provide for reciprocity with Amax's plan, and the Union then informed Amax that, because of the trustees' ruling, its "strongly held views on the advantages of portability" could not be accommodated with Amax's proposal (A. 64-66). Thus, the fund trustees merely informed the Union that because of limitations in the terms of the trust, if the Union agreed to Amax's proposal there would be no reciprocity; they did not participate in the Union's decision to reject Amax's proposal for a separate plan.[9]

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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[9] Moreover, since the employer-appointed trustee participated in the decision not to grant reciprocity, Amax's argument would make him a collective bargaining representative of the Union, along with the union-appointed trustee, a result that is contrary to Amax's position in this case that the employer-appointed trustee is a collective bargaining representative of the employers under Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B).

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